No. 6178

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SIERRA PACIFIC POWER COMPANY, a corporation,
Plaintiff and Appellee,

vs.

CITY OF RENO, a Municipal Corporation, E. E. ROBERTS, Mayor of the City of Reno, JAMES GLYNN, City Engineer of the City of Reno, LEROY F. PIKE, City Attorney of the City of Reno,
Defendants,

CITY OF RENO,
Appellant.

In Equity No. G—29

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

STATEMENT OF CASE.

The appellee and its predecessors in interest have for many years been, and now are, engaged in the business of selling and distributing water, and serving the inhabitants of the City of Reno with water for domestic and other purposes, and have used, and are using, the streets and alleys of the City of Reno, under claim of franchise, and acquiescence by the city for many years, for the purpose of effecting such service.

Some months prior to March 27, 1930, the company commenced the installation of water meters on its mains and services on the streets and adjacent to the streets of the City of Reno. These meters were installed for the purposes which are set forth in the complaint and which may be generally stated as being for checking and statistical purposes. The company desiring, and finding it necessary to obtain, the following information and statistical data:

(a) The amount of water necessary to be furnished to its customers;

(b) The waste by customers, if any, and the classification of such waste between customers;

(c) Whether there are leakages in the mains or services, and if the same are due to defects in its mains, etc.;

(d) The reasonable and normal use of various classes;

(e) To determine and ascertain the use by its various consumers so that it could obtain information for the purpose of rate classification; and

(f) The amount of water necessary to be furnished to the inhabitants of the Cities of Reno and Sparks so that the company could provide for such additional water as may be necessary for the conduct of its business, and to supply its customers and provide service for the continued increase in population of the said cities (Trans. pp. 4 to 7, inc.).

On March 27, 1930, the City Attorney of Reno, acting under instructions from the Mayor, demanded that the

meters and foundations be immediately removed and that the company cease installing meters in the streets and alleys (Trans. p. 8). The next day the City Attorney addressed a further communication to the company demanding that the meters so installed be removed within ten days, and if not removed within ten days that the City Engineering Department would remove the same (Trans. p. 9).

In this situation the appellee filed its bill of complaint for injunction in the United States District Court for the District of Nevada. A temporary restraining order was issued, restraining the defendants from their threatened action until hearing of the application for injunction. The application for injunction was set for hearing by order of the court for the twelfth day of April, 1930. *On the eighth day of April, 1930, the attorneys for the respective parties stipulated that the hearing of the application for injunction be continued until the twenty-fourth day of April, 1930, and further stipulated that the restraining order be continued in full force and effect until said date and until the hearing of the application for injunction* (Trans. p. 22). An appropriate order was thereupon made by the District Judge (Trans. p. 23).

On April 24, 1930, the application for injunction came on for hearing and was heard by the court. The injunction was granted, the court ordering that the restraining order be continued as an injunction *pendente lite.* The pleadings before the court at the time of the hearing were the verified complaint of the plaintiff and motion to dismiss the complaint and dissolve temporary restraining

order of the defendants. At the time of the hearing of the application for injunction and the granting thereof the answer of the defendant and the reply of the plaintiff had not been filed.

BRIEF OF ARGUMENT.

I.

It is first urged on behalf of the appellant that the appellee had and has no right to install water meters or similar mechanical devices at any place within the limits of the City of Reno because of certain provisions of "An Act defining public utilities, etc." The appellant relied upon Section 13 of the Act, which is set forth in full in its brief. This section confers upon the Commission the power to ascertain and prescribe adequate, convenient and serviceable standards for the measurement of service and of the product sold or delivered; and to prescribe rules and regulations for the purpose of testing the product and for the measurement thereof. In general, it is similar to the statutes which can be found in the public utility acts of the various states. Section 13, however, contains the following proviso:

> "Provided, that in cities of more than ten thousand population nothing in this act shall direct or permit the installation or use of mechanical water meters or similar mechanical devices to measure the quantity of water served or delivered to water users."

It is not disputed that the City of Reno has a population of more than ten thousand, but we do urge that

this proviso has no application to the situation presented by the bill of complaint. The appellee in its complaint sets forth the purpose and necessity for the installation of the meters (Trans. pp. 4 to 7, inc.) and specifically states (Trans. p. 7) as follows:

> "That the meters so installed by the plaintiff and other meters which the plaintiff intends to install, operate and maintain, are, and will be, installed for the purposes hereinbefore set forth, and are and will be check meters for the purpose of giving to the company information and data necessary and desirable in the operation of its business. That said meters have not been installed, nor will the meters which the company proposes to install be installed, for the purpose of fixing charges against the users and consumers of plaintiff in the City of Reno."

Under a construction most favorable to appellant, the most that can be said of the proviso in Section 13, is that it was intended to prevent the installation of meters or similar mechanical devices when the same were to be used to measure the quantity of water served or delivered to the individual consumer. The District Court also took this view as will be seen by its memoranda opinion (Trans. p. 75).

We urge that the act certainly was never intended and that it does not prohibit the utility furnishing water to the cities, and the inhabitants thereof, of more than ten thousand population, from installing upon their mains, lines and services within the city check meters or other apparatus used solely for statistical information to the utility.

II.

It is urged in support of "Assigned Error 2" that the District Court erred in failing to dismiss the complaint because it failed to allege permission of the Public Service Commission to install water meters, even though the meters were to be but check meters.

This is indeed an anomalous objection. The city urges, first, that no meters were permitted even with the consent of the Commission, and then claims error because the complaint did not allege a permission from the Public Service Commission to install the meters.

We submit that there is nothing in either Section 13, or in any other provision of the public utility act, which prevents or restricts a public utility from installing check meters, and there is no provision of the act or any of the sections referred to which requires a public utility to first obtain permission of the Public Service Commission before it installs devices for the measurement of its product. The public utility act was not intended to make the Public Service Commission either the owner, general manager, or operator of public utilities. The utility has the right to manage and operate its property, subject only to reasonable regulation by the Commission as to rates and service.

State Public Utilities Commission v. Springfield G. & E. Co., 125 N. E. 891;

Missouri ex rel. S. W. Bell T. Co. v. Public Service Commission, 262 U. S. 276, 67 L. Ed. 981.

III.

We take no issue with the declarations of law set forth in the decisions referred to by appellant under Paragraph III of its brief. The decisions therein hold that in matters of franchise all intendments are in favor of the public and that all ambiguities in the franchise will be resolved in favor of the public and against the grantee.

As respects the matter of pleading and the sufficiency thereof, no authorities are cited. The allegations of the complaint, it is true, do not set up specifically and in detail evidentiary matter but pleads the ultimate facts.

It is also argued in this paragraph of appellant's brief that the evidence and exhibits utterly fail to connect the appellee with any franchise right whatever. We desire to call the court's attention, first, that the verified complaint which was admitted in evidence alleges:

> "That the plaintiff and its predecessors in interest at all times mentioned in the complaint and for more than twenty years last past owned, operated and maintained * * * water rights, mains and services * * * which were and now are used and useful in selling and furnishing, serving and distributing water to the inhabitants of the Cities of Reno and Sparks. * * * That plaintiff and its predecessors in interest, acting as aforesaid, have been acting under and by virtue of franchise and the right to furnish, serve, distribute and sell water to the inhabitants of the cities of Reno and Sparks. * * *"

The complaint also alleges:

> "That plaintiff and its predecessors in interest for more than twenty years last past in the operation and maintenance of its plant, pipe lines, mains and services have used the streets and alleys of said City of Reno and have laid, installed and maintained under said streets and alleys mains, pipe lines, services * * * for the purpose of furnishing, selling and distributing water to the inhabitants of the City of Reno. * * *" (Trans. pp. 3, 4)

This allegation in the verified bill is a sufficient allegation of the ultimate fact of franchise and of the use of the streets and alleys for more than twenty years for the purpose of furnishing the service by appellee and predecessors. It is also sufficient evidence to sustain the chain of title if such be necessary.

In this connection we also call the court's attention to the following statement and admission in appellant's brief:

> "Appellee and its predecessors in interest have for many years last past been and now are engaged in the business of serving and distributing water to appellant and its inhabitants and using under claim of franchise rights so to do the streets and alleys of appellant for the purpose of effecting such service and distribution." (Appellant's Brief, p. 1)

Moreover, we desire to point out to the court that no *statement of the evidence* was ever presented, filed or approved by the District Court and no statement is included in the transcript before this court.

The testimony does not become a part of the record without the approval of the Judge.

Buessel v. United States, 258 Federal 811, 823.

Where the record was not approved by the Judge it will be presumed that the court's findings were supported by evidence other than that contained in the record.

Carson v. Hurt, 250 Fed. 30, 33.

Upon the evidence presented and the fact that no statement was filed this court will conclusively presume that Sierra Pacific Power Company is a successor to the rights and franchises of the Reno Water Company and A. A. Evans. The evidence discloses (Trans. pp. 31, 32) that on December 14, 1874, and on March 5, 1879, the Board of County Commissioners of Washoe County, by orders and resolutions, granted to Reno Water Company the right of way to lay down pipes in the streets and alleys of the town of Reno (this was before the incorporation of the city). At the time of the adoption of these resolutions, under Subdivision Fourth, of Section 8 of "An Act to create a Board of County Commissioners in the several counties of this state and to define their duties and powers", approved March 6, 1865, Revised Laws, 1912, Section 1508, the County Commissioners had the power:

> "To lay out, control, and manage public roads, turnpikes, ferries, and bridges within the county, in all cases where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect."

In the situation presented by the evidence, the company undoubtedly has a property right in the use of the streets and alleys of the City of Reno.

McQuillin's Municipal Corporations, page 3566;
Boise etc. Water Co. v. Boise City, 230 U. S. 84, 57 L. Ed. 1400;
Owensboro v. Cumberland Tel. Co., 230 U. S. 58, 57 L. Ed. 1389;
Iowa Tel. Co. v. City of Keokuk, 226 Fed. 82;
Northern Ohio T. & L. Co. v. Ohio, 245 U. S. 574, 62 L. Ed. 481;
City of Covington v. Cincinnati Street Ry. Co., 246 U. S. 413, 62 L. Ed. 802.

IV.

Arguing in support of assigned error No. 4, the appellant contends that the appellee is not engaged in the business of selling water but that the title to the water is in the consumers and that the utility is a mere carrier and distributor. Appellant relies upon the case of *Prosole v. Steamboat Canal Co.,* 37 Nev. 154.

It is true that the Supreme Court of Nevada in its original opinion so decided in the case of a water company selling water to farmers and ranchers for irrigation. Upon rehearing, however, the court said:

> "Since we rendered the decision in this case, the Supreme Court of the United States has rendered the decision in the case of San Joaquin and Kings River Canal and Irrigation Company v. County of Stan-

islaus, 233 U. S. 454, 34 Sup. Ct. 665, 58 L. Ed. 1041, and in appellant's petition for rehearing reference is made to this decision. One observation made by the Supreme Court of the United States in that case is especially pertinent to the principal issue at bar, inasmuch as it supports our position taken therein. The court said: 'No doubt it is true that such an appropriation and use of the water entitled those within reach of it to demand the use of a reasonable share on payment.'

"In the San Joaquin-Stanislaus case, supra, the court, speaking through Mr. Justice Holmes, makes some very pertinent observations relative to the property rights to be recognized in favor of the party furnishing the water, where the sole object for the diversion is that of sale and distribution. As to whether or not the appellant had a property interest in the right to furnish the water is not an issue in the case at bar, and our observations made in the opinion are not to be considered as decisive of this matter."

We think this case cannot be declared to be *stare decisis* in view of the decision of the Supreme Court of Nevada upon rehearing.

May we also say in this connection that we are unable to see the pertinency of this argument and contention in the instant case.

V.

By assignments 5 and 6, the appellant takes exception to the pleadings. The lower court undoubtedly had the

right to rule upon the sufficiency of the pleadings and that ruling, we believe, will not be reviewed upon appeal from an interlocutory injunction unless the pleadings failed to state a cause of action in equity.

We submit, however, that the pleadings are sufficient and are not subject to the objection contended for by counsel. Equity rule 22, Subdivision Third, is as follows:

> "Third: a short and simple statement of the ultimate facts upon which the plaintiff asks relief omitting any mere statement of evidence."

See also equity rule 19 wherein it is provided:

> "The court at every stage of the proceeding, must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

We submit that the complaint complies with the rule.

VI.

The complaint in the case does not merely allege a threatened injury irreparable in character, but clearly shows facts justifying equitable interposition. The complaint alleges that the plaintiff for more than twenty years, acting under claim of right and franchise, and with the acquiescence of the city, has been using the streets and alleys of the City of Reno for its pipe lines, mains and services; that it had installed foundations and meters for the purpose of gathering and obtaining certain specific data necessary to the business of the company;

that the defendant threatened to immediately enter upon the property of the plaintiff and remove and destroy the meters and foundations. This was not merely a threatened trespass, but was a threat to enter upon property of the plaintiff and destroy or remove certain of its equipment therefrom. It was also an invasion of the franchise rights or the rights acquired by long use and by the acquiescence of the defendant, and it seems to us that there can be no question but that these facts conclusively show threatened irreparable injury for which there is no adequate remedy at law.

Hoff v. Olson, 76 N. W. 1112;
Louis v. North Kingston, 11 Atl. 173.

Where a trespass, or series of trespasses, operate in effect to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by aid of injunction.

14 *R. C. L.,* Sec. 146, page 446;
Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 65, 46 L. Ed. 808;
Covington v. South Covington etc. R. Co., 256 U. S. 413, 62 L. Ed. 802;
Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 58, 57 L. Ed. 1389;
Mutual Oil Co. v. Empire Petroleum Co., 5 Fed. (2nd) 500.

VII.

The appellant by assigned error No. 8 complains that the temporary restraining order does not comply with the act of October 15, 1914. This is undoubtedly true. But the temporary restraining order was not thereby rendered void.

Arkansas Railroad Commission v. Chicago R. I. & P. R. Co., 247 U. S. 598, 71 L. Ed. 1224.

Moreover, this objection was waived by the stipulation which was entered into April 8, 1930 (Trans. p. 22), wherein the defendants stipulated that the hearing for application for injunction be continued to April 24, 1930, and that the restraining order be continued in full force and effect until said date and until the hearing of said application for injunction. This same objection is insisted upon by assigned error No. 9 and is argued in Paragraphs VIII, IX and X. The order granting the restraining order is not an appealable order, and the error, if any, is immaterial here because it does not affect the decision of the court in granting the interlocutory injunction.

SCOPE OF REVIEW OF ORDERS GRANTING PRELIMINARY INJUNCTIONS.

This being an appeal from an order granting an interlocutory injunction, heard upon the bill, and oral and documentary testimony on behalf of plaintiff and the motion to dismiss of the defendant without answer filed, this court will consider only whether or not the judicial

discretion of the trial court was improperly exercised, assuming, of course, that jurisdiction of the cause is shown.

Farrington v. Tokushige, 273 U. S. 284, 71 L. Ed. 646;

Mutual Oil Co. v. Empire Petroleum Co., 5 Fed. (2nd) 500;

Harding v. Corn Products Refining Co., 168 Fed. 658;

State v. United States, 279 U. S. 229, 73 L. Ed. 675.

Respectfully submitted,

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